

School Law

Federal law provides only limited protection against school violence

A Preventable Tragedy

This month's case, *Niziol v. Pasco County District School Board*, tells the story of a tragedy that unfolded over the course of a single day. A boy brought a loaded pistol to Ridgewood High School, near Tampa, Fla., and was killed in the school parking lot that afternoon when the gun accidentally discharged.

The boy's parents sued the district, claiming school officials knew about the gun but failed to take action to avert a tragedy. The district won in federal court but might still be liable for damages under Florida law.

In her ruling, U.S. Magistrate Judge Mary S. Scriven observed that "the presence of laws does not guarantee remedies for every wrong." I discussed this lesson in a recent column about *Gonzaga University v. Doe*, in which the U.S. Supreme Court ruled that the Family Educational Rights and Privacy Act does not give individuals a right to sue for FERPA violations because Congress did not clearly authorize such suits. (See "Rethinking Privacy," November 2002 *ASBJ*; online on the Archive page of www.asbj.com.)

Niziol provides another illustration of that lesson.

A series of tragic mistakes

Before I begin the story, I must make two disclaimers. First, the facts are really alleged by the plaintiffs and summarized—not verified—by the judge. Second, Judge Scriven's legal discussion assumes, for the sake of argument, that the plaintiffs' factual claims are correct and then considers whether the law gives the plaintiffs the right to sue for damages based on those

allegations. So remember, the following story is an alleged story.

On the morning of Jan. 19, 2000, Ted Anthony Niziol brought a .22-caliber pistol to school in his car, which he parked in the school parking lot. Before first period, Ted told his friend Andrew Enerson about the gun. Andrew's girlfriend, Samantha Lang, learned about the gun and was afraid Ted would sell it to a student named Marty, who would use it to kill Andrew.

Samantha wrote this note (a pathetically classic teenage piece written with the familiar and breezy teenage abbreviations) and gave it to Ted: "Hi Teddy. So what is this crap about you selling Marty a gun b/c if I get shot I'm gonna be mad. Also what does he need for to shoot Andrew n e-ways." Ted wrote back on the same piece of paper, "I'm not selling Marty a gun. I'm selling it to Joey."

Not reassured, Samantha gave the note and the response to Andrew, who gave it to his second-period teacher, Danita Williams. At 9:10 a.m. Andrew and Williams did the right thing: They quickly left class and took the note to Principal Arthur O'Donnell. It's at this point that a series of tragic mistakes began, committed by the adults in charge and by the students.

One irreversible moment

According to the plaintiffs' claims, O'Donnell discussed the note with Andrew and his teacher. The principal kept the note, told Andrew he would take care of the situation, and sent the boy back to class. He did not, however, tell School Resource Officer Joe Little about the note

By Benjamin Dowling-Sendor

“The presence of laws does not guarantee remedies for every wrong.”

—U.S. Magistrate Judge
Mary S. Scriven

when the officer entered the office during the discussion.

That morning, Andrew and his parents had a scheduled meeting with the school counselor. Andrew told his parents about the note and said he feared for his life. Andrew's parents told the counselor, who said he would talk to O'Donnell and Little. Andrew's parents wanted their son to leave school for the day, but he decided not to because he did not want other students to suspect that he had told school officials about the note.

At 11 a.m. the counselor talked to Little about the note and pointed out Samantha, Andrew, and a student named Steven Moschella. Little met with O'Donnell at 12:30 p.m. to discuss the note. At 1:15 p.m., Little interviewed the student identified in the note as Joey, but Joey denied knowing about the gun. Remarkably, according to the Niziols' claims, Little did not question Ted, Andrew, or Samantha.

At 1 p.m., Little's student assistant, Rupal Patel, read the note on the resource officer's desk. Rupal was a friend of Ted and alerted him as they passed in the hallway. Ted ran to his car, grabbed the gun, hid it among bushes, and returned to class.

At 2 p.m., Ted met his sister and three other students at his car in the parking lot. He retrieved the gun, and they all got into the car. Another student drove up, and Steven picked up the gun to show it to him. In one cruelly irreversible moment, the gun accidentally discharged, and the bullet struck Ted. Ted left the car and fell to the ground. He died an hour later.

The parents sue

Ted's parents sued the school board, Principal O'Donnell, Little, and Pasco County Sheriff Joe White in Federal District Court. The Niziols alleged that the defendants had violated the 14th Amendment's Due Process Clause and 42 U.S.C. Section 1983 by violating the federal Gun-Free Schools Act. (Generally speaking, Section 1983 lets individuals, subject to complicated criteria, sue government agencies and officials in federal court for violations of rights secured by the U.S. Constitution or federal statutes.)

The Niziols' suit also included a claim for wrongful death under Florida law.

The defendants asked Magistrate Scriven to dismiss the claims without a jury trial, contending that the defendants were not liable to pay damages under federal or Florida law even if the allegations were factually correct. The magistrate dismissed all of the federal law claims, though she postponed her decision on the state law claims.

The Niziols directed their claim under the Gun-Free Schools Act against the school board and Principal O'Donnell. GFSA provides that any state receiving federal funds under the statute must have a law requiring school boards to expel for at least one year any students who bring weapons to school.

The statute also requires that school districts that receive such federal funds must have a policy that mandates the referral of these students to the criminal justice or juvenile delinquency system. The Niziols contended that the school board and O'Donnell violated GFSA because school officials were deliberately indifferent to the presence of a gun at school, even though the officials knew the gun was there, knew where it was, and knew who possessed it.

Scriven rejected the Niziols' argument, ruling that GFSA does not give individuals the right to bring private lawsuits for damages to enforce the statute. Scriven relied on *Gonzaga*, in which the Supreme Court ruled that Congress did not create a private right to enforce FERPA either expressly or by clear implication.

Quoting from *Gonzaga*, Scriven wrote that “unless Congress ‘speak[s] with a clear voice’ and manifests an ‘unambiguous’ intent to create individually enforceable rights, federal funding provisions provide no basis for private enforcement

by Section 1983.” Scriven found that GFSA does not expressly or by implication authorize individuals to bring lawsuits for damages to enforce the act. Instead, Congress decided to use the carrot of federal aid—and the stick of loss of federal aid—to enforce GFSA.

Private violence

The magistrate turned next to the Niziols' claims that the resource officer and Sheriff White violated Ted's right to due process under the 14th Amendment. The Niziols claimed that Little's alleged failure to deal with the report of the gun was “wanton, reckless, and intentional” and showed “callous disregard” and deliberate indifference to Ted's rights, and that Little's conduct “shocks the conscience.” They also claimed that his failure to take adequate steps violated the Due Process Clause.

Scriven rejected the due process claims against the resource officer. She observed that federal courts confine the “shocks the conscience” standard to exceptionally shocking conduct, such as a case in which a uniformed police officer committed a rape. In other words, even though Little's alleged failure to act was (I believe) shocking, it didn't fall within the tiny category of truly outrageous official conduct prohibited by the Due Process Clause.

Scriven noted that the Niziols' claim about a special relationship between Little and Ted rested on the Supreme Court's 1989 decision in *DeShaney v. Winnebago County Department of Social Services*. In *DeShaney*, the court ruled that the Due Process Clause generally does not require government agencies to protect people from private violence.

The high court recognized two exceptions to this general rule: (1) situa-

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tions in which a government agency or employee has a special relationship with a person that requires the agency to protect the person, and (2) situations in which a government agency or employee either created or enhanced the danger of harm to a person. Scriven decided that neither of these exceptions applied to Little.

As Scriven explained, the “special relationship” exception pertains to custodial relationships—such as imprisonment and involuntary commitment to a mental institution—in which the government deprives individuals of their liberty to move and act and, therefore, deprives them of their ability to protect themselves. Although compulsory attendance gives school officials considerable control over students, Scriven decided that it does not give school officials the degree required to trigger a due process duty to protect students from violence by others.

Quoting from *Reed v. Gardner*, a 1993 decision by the U.S. Court of Appeals for the Seventh Circuit, Scriven wrote, “Inaction by the state in the face of a known danger is not enough to trigger the obligation; according to *DeShaney*, the state must have limited in some way the liberty of a citizen to act on his own behalf.”

Scriven also concluded that Little neither created nor enhanced the danger to Ted. In other cases involving violence against students, she noted, federal courts have not found due process violations based on danger created or enhanced by government employees—even in the lawsuits stemming from the Columbine High School massacre. (The sole exception among those suits was one claiming law enforcement officials were liable for the death of a Columbine teacher because they knew he had been wounded and needed medical help, but they prevented emergency personnel or law enforcement from entering the school to help him for more than three hours.)

Scriven also rejected the Niziols’ contention that Sheriff White had violated Ted’s due process rights by failing to establish a sound policy about guns on school grounds and by failing to train Little to respond to the report of a gun at

school. White could be liable for a “derivative” due process violation based on Little’s conduct only if the resource officer himself had violated Ted’s right to due process, she said. Since Scriven had already ruled that Little’s alleged actions (or failure to act) did not violate the Due Process Clause, she ruled that White could not be liable, either.

Scriven decided to postpone her decision on the Niziols’ claims that the defendants were liable for damages under Florida law. She subsequently dismissed the claim but allowed the parents to pursue it in state court.

‘Blame enough to share’

I believe Magistrate Scriven correctly applied federal law to dismiss the Niziols’ claims. Recognize that her decision does not absolve any of the defendants of responsibility for Ted’s death—although, of course, Ted himself was primarily responsible by bringing a loaded gun to school. Scriven’s decision does not tell us how Ted gained access to the gun and ammunition in the first place. And it cannot tell us about the life, environment, and values of a teenage boy who exercised such poor judgment.

But it’s obvious that if the Niziols’ factual allegations are correct, the defendants also must bear partial responsibility for Ted’s death. According to those allegations, during an entire school day, adults who knew about the gun had the opportunity and responsibility to take effective action to protect students’ and employees’ lives but failed to do so.

As Scriven observed, “there is blame enough to share” in this tragedy. Although she correctly dismissed the federal claims against the defendants, that decision does not clear them of wrongful death claims under Florida state law. As this case illustrates, federal law usually provides only minimal protection for the rights of individual students against violence in school. State law and common sense sometimes impose a higher standard of judgment and conduct.

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